reasonably have been meant.

It seems to me, further, that there is not even the remotest resemblance between the two names. In all the reported cases relating to misnomer there has usually been a strong resemblance between the two names with some minor variation which a court has sometimes allowed to be corrected on the ground that the old name and the new name were intended to refer to the same person. Here Malaya Indonesia Line and Swedish East Asia Co. Ltd. are two entirely different and distinct names and one is clearly not the other from any point of view.

As Ambrose J. has said in his judgment, the application of the plaintiffs/appellants by Summons-in-Chambers No. 411 of 1964 dated 26th March, 1964 was not for leave to amend the writ by changing the name of the defendants from "Malaya Indonesia Line" to "Swedish East Asia Co. Ltd.". Their application was made under Order XVI rule 12 which reads as follows:—

"Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial, by summons, or at a trial of the action in a summary manner."

The substitution of "Swedish East Asia Co. Ltd." as defendants in place of "Malaya Indonesia Line" by the order of court of 3rd April, 1964 involved the addition of "Swedish East Asia Co. Ltd." as a new party in replacement of the party that was removed.

Complaint was made before this court that there was no appeal against this order substituting "Swedish East Asia Co. Ltd." as defendants in place of "Malaya Indonesia Line." Malaya Indonesia Line, of course, need not have concerned themselves with any appeal since they had been removed as defendants. If the complaint was directed against Swedish East Asia Co. Ltd., the new defendants, the answer is that there was clearly no necessity, on the facts, for them to appeal. Their remedy, namely the right to plead with success the defence of limitation, was still open to them.

It is clear from Order XVI rule 11(4) that proceedings as against Swedish East Asia Co. Ltd. shall be deemed to have begun only on the service of the writ on them. Service of the writ on them was dispensed with. Proceedings against them can, therefore, be deemed to have been instituted, at the very earliest, only when they were made a party i.e. on 3rd April, 1964 by which time the period of limitation had already expired.

Some reliance seems to have been placed on Order XVI rule 13 for the proposition that the added or substituted defendant should be in exactly the same position as the original defendant for all purposes and that time should begin to run against the plaintiff only up to the date of the original writ as against such a defendant. I do not think that Order XVI rule 13 contemplates any inroads on the law relating to limitation so as to enable a substituted defendant to be made liable as though he had been sued in the first instance within the statutory period. One has only to consider the concluding words of Order XVI rule 11 to realise that this must be so because proceedings against an added party under this rule "shall be deemed to have begun only on the service on it of such writ." In other words, when a defendant is added or substituted the proceedings cannot be ante-dated as against him. He has a vested right not to be successfully sued outside the limitation period.

In conclusion, it should be observed that, from the correspondence, counsel for the plaintiffs/appellants were, in effect, informed, before the issue of the original writ, that the correct defendants should have been "Swedish East Asia Co. Ltd.". This seems to have been ignored or overlooked. Furthermore, if the bill of lading in question had been more carefully scrutinised it would have been obvious that the carrier of the goods in question was "Swedish East Asia Co. Ltd." and nobody else. On the merits it seems to me that the plaintiffs have only themselves to blame.

For all these reasons, the appeal must accordingly be dismissed with costs.

Wee Chong Jin C.J. and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Donaldson & Burkinshaw.*

ABDUL RAHIM v. BRITISH AND MALAYA TRUSTEES LTD.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Chua J.) September 30, 1966]

[Singapore — F.C. Civil Appeal No. Y9 of 1966]

Landlord and Tenant — Space in wall — Agreement — Whether creates licence or tenancy — Damages for overstay.

This was an appeal from the decision of Winslow J. who held that the agreement between the parties did not create a tenancy but merely a licence for the occupation of a space between pillars in a common passage way ([1966] 2 M.L.J. 110).

Held: (1) in determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee, the intention of the parties is the paramount consideration and in this case it was quite clear that what was granted to the appellant was a space in a wall for them to hang up an almeirah to display and sell their wares; this was a personal privilege and created no interest in land;

(2) damages should be awarded to the respondents

at the rate of $40 per month from May 1, 1963 until they recover possession.

Case referred to:—

(1) *Cobb* v. *Lane* [1952] 1 All E.R. 1199.

FEDERAL COURT.

S. Santhiran for the appellant.

D. G. Ironside for the respondents.

Cur. Adv. Vult.

Chua J.: This is an appeal against the judgment of the High Court in which the court adjudged and declared that the right of the defendants Abdul Jabbar and Abdul Rahim to use a space in the common passageway in the Arcade, Raffles Place, Singapore, or any other part of the said passageway has been determined and ordered that the defendants and/or their servants and/or agents be restrained from using the said space or any other part of the said common passageway.

It is the second defendant Abdul Rahim who has appealed against the said judgment of the High Court.

The facts in this case are quite simple. On the 26th August, 1958, S. A. A. Alkaff, one of the former trustees of the Settlement of Syed Shaikh Alkaff deceased, entered into an agreement, on one of their usual printed forms for tenancy agreements, with the appellant and Abdul Jabbar in which the appellant and Abdul Jabbar were described collectively as "the tenant", granting them a "monthly tenancy" at the "rent" of $40 p.m. in respect of the "tenancy" of premises described as "second pillar on the right hand side of the Arcade from the entrance from Raffles Place; size of premises 6 feet high, 4 feet wide and 8 inches depth." The agreement provides that the tenancy may be determined by either party by one month's notice in writing given to the other party. It is also provided by clause (h) of paragraph 2 that no new tenancy agreement relating to the said premises will be made or recognised as having been made on the termination of the existing tenancy save by the due execution of such a new tenancy agreement on the landlords' printed form of tenancy agreement then in current use.

The evidence of the appellant was to the effect that before the agreement was signed the said S. A. A. Alkaff pointed out to him the space which he was to occupy by indicating it with his feet. He claimed that the space pointed out was a far larger space than that described in the agreement. On going into occupation of the space he placed an almeirah containing several compartments for goods in the space. The almeirah was screwed to the wall. In 1961 he extended the space occupied by him and thereafter occupied a space 9 feet high, 14 feet 8 inches wide and 4 feet 8 inches deep. This was done with the approval of S. A. A. Alkaff.

There is no evidence of the execution of any new tenancy and the only agreement which the learned trial judge had to construe was the agreement of the 26th August, 1958, in order to decide whether it created a valid tenancy or merely conferred a licence on the appellant and Abdul Jabbar in respect of the space described therein.

The main question for the consideration of this court is whether the learned trial judge was right in coming to the conclusion that the agreement of the 26th August, 1958, created merely a licence.

It is clear from the authorities that in determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee, the intention of the parties is the paramount consideration. The intention of the parties must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances. As Denning L.J. said in *Cobb* v. *Lane*,[1] at p. 1202:

> "The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?"

When one examines the agreement of the 26th August, 1958, and the evidence of the appellant, it is quite clear, in my view, that what was granted to the appellant and Abdul Jabbar was a space in the wall for them to hang up an almeirah to display and sell their wares. That conclusion is very strongly supported by the rent receipt which was in this form:

> "Received from Abdul Jabbar and Abdul Rahim the sum of Dollars Forty only being *rent of side wall space* next to the S.C.S. Arcade."

To suggest that there was an intention in this case to create a relationship of landlord and tenant appears to me to be quite impossible. It seems to me that the appellant and Abdul Jabbar had only a personal privilege with no interest in the land.

In my view the learned trial judge was right in coming to the conclusion that the agreement of 1958 did not create a tenancy at all but only a contractual licence terminable by one month's notice in writing given by either side. Therefore this appeal should be dismissed.

There is a cross-appeal by the plaintiffs. The plaintiffs contend that the learned trial judge ought to have assessed damages and to have made an award to the plaintiffs. The learned trial judge said in his judgment: "I am not disposed to view the claim by the plaintiffs

for damages in respect of the defendant's overstay at the site since the expiry of the notice to quit, with any particular favour." I have read through the record and I see that no evidence was led by the plaintiffs on the question of damages. I am of the view, however, that damages should be awarded to the plaintiffs at the rate of $40 p.m. from 1st May, 1963, until the plaintiffs recover possession.

Wee Chong Jin C.J. and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *J. Tan Chor Yong & Co.; Ironside & de Souza.*

BATA SHOE COMPANY (MALAYA) LTD. v. EMPLOYEES PROVIDENT FUND BOARD

[O.C.J. (Gill J.) September 30, 1966]

[K.L. — Civil Suit No. 1 of 1965]

Provident Fund — Meaning of "employee" — Shop manager appointed by company — Scope of ostensible authority — Whether employees employed by a shop manager are employees of the company — Employees Provident Fund Ordinance, 1951, s. 2.

Master and Servant — Shop manager appointed by company — Shop manager appointing salesmen to assist him — Whether salesmen employees of company — "Contract of service" and "contract for service."

The plaintiff company sought a declaration that salesmen employed by their shop managers were not their employees for the purposes of the Employees Provident Fund Ordinance. It appeared that the shop managers were employed by the company under written agreements which gave a shop manager power to employ salesmen, salesgirls, clerks and servants and which provided that the shop manager was to be the employer of such salesmen, salesgirls, clerks and servants.

Held: (1) in view of the considerable control which the company had over the shop managers the shop managers were the employees of the company;

(2) in the light of all the evidence in this case the shop managers could not be said to be acting as the agents of the company when they recruited their own salesmen to assist them and therefore, there was no relationship of employer and employee within the meaning of the Employees Provident Fund Ordinance, between the plaintiff company and the salesmen employed by its shop managers.

Cases referred to:—

(1) *Short* v. *J. & W. Henderson Ltd.* (1946), 174 L.T. 417, 427.

(2) *Park* v. *Wilsons and Clyde Coal Co. Ltd.* [1928] S.C. 121, 134.

(3) *Stevenson Jordan and Harrison Ltd.* v. *MacDonald and Evans* [1952] 1 T.L.R. 101, 111.

(4) *Pauley* v. *Kenaldo* [1953] 1 All E.R. 226.

(5) *Richardson* v. *Cartwright* (1844), 174 E.R. 833.

(6) *Edmonds* v. *Bushell & Jones* (1865), L.R. 1 Q.B. 97.

(7) *Smith* v. *M'Guire* (1858), 157 E.R. 589.

(8) *Watteau* v. *Fenwick* [1893] 1 Q.B. 346.

(9) *Daun* v. *Simmins* (1879), 41 N.S.L.T. 783.

CIVIL SUIT.

M. Shankar for the plaintiff.

Cheng Tim Pin for the defendant.

Cur. Adv. Vult.

Gill J.: The plaintiff company is a manufacturer of footwear and incidental goods which it sells in its retail shops throughout Malaya. Such of its shops is under the charge and general control of a "shop manager" who is appointed under a standard written agreement. Clause 9 of the agreement provides as follows:

> "To assist him in the conduct of the business, he may employ any salesmen, salesgirls, clerks or servants and may agree with such persons the terms and the rates of remuneration for his/her services provided they comply with the requirements of the laws of the country and further provided that it is understood and agreed upon that he is the employer of such salesmen, salesgirls, clerks or servants."

Clause 4 of the agreement provides that as remuneration for his services the shop manager shall be entitled to a commission at the rate of 7 to 9 per cent on the amount received by the shop in respect of the sale of boots, shoes and all other goods whatsoever, and clause 7 requires him at all times to keep or cause to be kept in proper books all usual accounts of all receipts, payments, transactions and dealings in the course of the business of the shop and to submit fortnightly statements of such accounts and remit all monies received by him to the company. Clause 5 of the agreement says that he shall be solely responsible for and shall discharge all recurring charges and expenses whatsoever incurred in carrying on the shop, including wages, salaries and certain other specified charges.

The defendant contends that all salesmen, salesgirls, clerks or servants (to whom I shall hereinafter refer collectively as "the salesmen") employed in the plaintiff's retail shops are employees of the plaintiff within the meaning of the Employees Provident Fund Ordinance, 1951, and that consequently the plaintiff is liable to make contributions under the Ordinance in respect of such salesmen.

The plaintiff has paid the defendant a sum of $83,552 by way of Employees Provident Fund contributions in respect of such salesmen without prejudice to the contention that it is not legally liable so to do and on the basis that the said payment will be refunded in the event of it being judicially decided that there is in fact no such liability.

This suit has been brought for a declaration that the salesmen employed by the shop managers are not the "employees" of the plaintiff, nor is the plaintiff their "employer" within the meaning of the Ordinance, and that consequently the plaintiff is and at all material times has been under no liability to make contributions to the